No. 08-1330

In the Supreme Court of the United States

LEEVAN SANDS, ET AL., PETITIONERS

v.

DEPARTMENT OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's judgment dismissing petitioners' complaint seeking to compel the Department of Homeland Security to adjudicate their visa petitions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C19-C22) is not published in the *Federal Reporter* but is reprinted in 308 Fed. Appx. 418. The decision of the district court (App., *infra*, 1a-8a)[1] is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2009. The petition for a writ of certiorari was filed on March 14, 2009. The petition does not identify a basis for this Court's jurisdiction; the jurisdiction of this Court would rest on 28 U.S.C. 1254(1).

[1] Because of the copy of the district court's decision that is contained in the appendix to the petition contains a number of errors, the government has appended a copy of that decision to this brief.

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien may seek a visa petition as a first step in establishing a legal basis to enter or remain in the United States. As relevant here, the INA authorizes the Department of Homeland Security (DHS) to grant an employment-based immigrant visa petition for an alien who "has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim" and "whose achievements have been recognized in the field through extensive documentation," if the "alien seeks to enter the United States to continue work in the area of extraordinary ability" and "the alien's entry into the United States will substantially benefit prospectively the United States." 8 U.S.C. 1153(b)(1)(A).

In order to obtain such a visa petition, an alien must file a Form I-140, Petition for Alien of Extraordinary Ability, with United States Citizenship and Immigration Services (CIS). See 8 U.S.C. 1154(a)(1)(E); 8 C.F.R. 204.5(h). If the alien's visa petition is denied, he or she may seek administrative review of that decision with the Administrative Appeals Office (AAO) within CIS. 8 C.F.R. 204.5(n)(2). If the AAO sustains the denial of the petition, that decision is final agency action. If the alien's immigrant visa petition is approved, he may seek to obtain a visa from the consulate in his country of residence in order to enter the United States, see 8 U.S.C. 1201(a)(1); 22 C.F.R. 42.23, or may attempt to adjust his status to that of a lawful permanent resident, see 8 U.S.C. 1255.

The INA also authorizes revocation of visa petitions that previously have been approved. "The Secretary of

Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him." 8 U.S.C. 1155. Prior to such revocation, the alien "must be given the opportunity to offer evidence in support of the petition * * * and in opposition to the grounds alleged for revocation of the approval." 8 C.F.R. 205.2(b). If the visa petition ultimately is revoked, the alien must be provided with written notification of the decision, 8 C.F.R. 205.2(c), and may appeal the decision to the AAO within 15 days, 8 C.F.R. 205.2(d). If the AAO sustains the revocation, that decision is final agency action.

2. Petitioners are nine aliens who seek admission to the United States based on their athletic abilities. Pet. App. A1, C20. Each of them filed a Form I-140 in order to obtain an approved employment-based immigrant visa petition under 8 U.S.C. 1153(b)(1)(A). Pet. App. A1, C20.

Petitioners filed suit in federal district court against DHS, CIS, and several individual officers of those agencies. Pet. App. C20. They alleged that CIS denied the I-140 petitions filed by seven of them and that a CIS officer notified the other two of them that he planned to revoke their approved I-140 petitions. *Id.* at A2. Petitioners contend that the government has "targeted" their I-140 petitions "for denial and revocation" and has adopted a "targeting agenda" for all persons represented by their attorney. *Id.* at A3-A4.

In terms of the relief requested, petitioners sought "to compel the Defendants to adjudicate" their visa petitions. Pet. App. A1. They also sought a preliminary injunction and temporary restraining order against the CIS officer responsible for adjudicating their visa petitions. *Id.* at A5. Petitioners contended that the dis-

trict court has jurisdiction to order such relief because "unlawful acts of Officers of the Department of Homeland Security can be reviewed and corrected by the Federal Courts." *Id.* at A2. They also asserted that jurisdiction was proper under 8 U.S.C. 1329 (the INA), 28 U.S.C. 1361 (the mandamus statute), 28 U.S.C. 1331 (the federal-question jurisdiction statute), 5 U.S.C. 555(b) (the Administrative Procedure Act (APA)), and 28 U.S.C. 1367(a) (the supplemental jurisdiction statute). Pet. App. A2.

The district court dismissed petitioners' complaint for lack of jurisdiction. App., *infra*, 1a-8a. The court noted that the government had filed a motion to dismiss the complaint for lack of jurisdiction, and that petitioners had filed a response that "utterly fail[ed] to address the government's jurisdictional arguments," instead "ma[king] a frivolous argument, unsupported by any authority, that the U.S. Attorney's Office must be disqualified from representation of the defendants." *Id.* at 3a.

The court determined that none of petitioners' claimed bases for jurisdiction would permit it to order the relief petitioners requested, which was "to compel the Defendants to adjudicate" petitioners' visa petitions. App., *infra*, 1a, 3a-8a. The court first determined that it did not have jurisdiction under 8 U.S.C. 1329, the provision of the INA that addresses district court jurisdiction, because Section 1329 "only confers jurisdiction if the action is brought by the United States" and contains "clear language expressing that it does not provide jurisdiction for suits against the United States, its agen-

cies, or officers." App., *infra*, 4a.[2] The court then stated that, even if there was jurisdiction under Section 1329, review would be precluded by 8 U.S.C. 1252(a)(2)(B)(ii), which bars review of "discretionary decisions made under §§ 1151-1378 of the INA." App., *infra*, 5a.[3]

The district court also determined that it did not have jurisdiction under the mandamus statute, 28 U.S.C. 1361. App., *infra*, 5a-6a. The court explained that "[m]andamus jurisdiction arises only in cases where (1) the defendant owes a clear nondiscretionary duty to the plaintiff and (2) the plaintiff has exhausted all other avenues of relief," and that petitioners "fail to meet the first prong because revocation of I-140 petitions is a discretionary act." *Id.* at 6a (internal quotation marks omitted).

The district court then held that there was no jurisdiction under any of the other provisions petitioners invoked. App., *infra*, 6a-8a. The court determined that neither 28 U.S.C. 1331 nor the APA provides an independent basis for subject matter jurisdiction in the absence of a "statutory or constitutional basis" for the relief requested. App., *infra*, 6a-7a. And the court held that 28 U.S.C. 1367 could not confer jurisdiction here

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[2] 8 U.S.C. 1329 provides, in pertinent part: "The district courts of the United States shall have jurisdiction of all causes, civil and criminal, brought by the United States that arise under the provisions of this subchapter. * * * Nothing in this section shall be construed as providing jurisdiction for suits against the United States or its agencies or officers."

[3] 8 U.S.C. 1252(a)(2)(B)(ii) provides that no court shall have jurisdiction to review any "decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title."

because it "grants a court supplemental jurisdiction only where the court has original subject matter jurisdiction." App., *infra*, 7a-8a.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. C19-C22. The court noted that petitioners had filed suit "to compel the defendants to adjudicate" their visa petitions. *Id.* at C20 (quoting second amended complaint). The court observed, however, that what petitioners appeared to be seeking was "*favorable* adjudication" of their petitions, because they did not allege that the government has "failed to act, or that there has been unreasonable delay in action on the applications." *Ibid.*

The court of appeals concluded that the district court "carefully considered each of the bases for jurisdiction in the district court alleged by [petitioners], and correctly concluded that none of them supported jurisdiction" over their claims. Pet. App. C21. In particular, the court of appeals stated that the district court "carefully concluded that 28 U.S.C. § 1361, the mandamus statute, provides no basis for jurisdiction because the action complained of is discretionary." *Ibid.* The court then noted in passing that "[t]he court could have also bottomed this conclusion on 8 U.S.C. § 1252(a)(2)(B)(ii), which explicitly strips the district court of jurisdiction under the mandamus statute." *Id.* at C21-C22.

ARGUMENT

Petitioners contend (Pet. 2-6) that the court of appeals erred in holding that the district court lacked jurisdiction over their claims to compel the Department of Homeland Security to adjudicate their visa petitions. In particular, they argue that the court of appeals erred in dismissing their case under 8 U.S.C. 1252(a)(2)(B)(ii),

because Section 1252(a)(2)(B)(ii) does not apply to class actions or because petitioners are exempt from Section 1252(a)(2)(B)(ii) under the reasoning in *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991).

Petitioners are mistaken. The court of appeals' statement about the effect of Section 1252(a)(2)(B)(ii) on their case was dictum. Moreover, the court's unpublished decision does not create binding circuit precedent, and there is no circuit conflict regarding whether Section 1252(a)(2)(B)(ii) applies to class actions. Nor is there any conflict with this Court's decision in *McNary*. In any event, this case would be a poor vehicle to consider the reach of Section 1252(a)(2)(B)(ii) in light of the self-contradictory nature of petitioners' claims and their failure to brief the jurisdictional issues below. Review by this Court is therefore unwarranted.

1. The court of appeals' statement about the reach of Section 1252(a)(2)(B)(ii) was dictum. Petitioners' complaint sought an order "to compel the [government] to adjudicate" their visa petitions. Pet. App. A1; see *id.* at C20; App., *infra*, 1a. The district court considered each of the asserted bases for jurisdiction and determined that none of them supported jurisdiction. *Id.* at 3a-8a. The court also stated that, even if one of the cited provisions did confer jurisdiction, 8 U.S.C. 1252(a)(2)(B)(ii) would preclude consideration of petitioners' claims. App., *infra*, 4a-5a. The court of appeals upheld the district court's determination that it lacked jurisdiction to compel adjudication of petitioners' claims, stating that the district court "carefully considered each of the bases for jurisdiction" and "correctly concluded" that none of them supported jurisdiction here. Pet. App. C21. The court of appeals then added that "[t]he court

could have also bottomed this conclusion on 8 U.S.C. 1252(a)(2)(B)." *Id.* at C21-C22.

The court of appeals upheld the district court's determination that there was no statute that authorized such an action in the first place, explicitly addressing the federal mandamus statute. Pet. App. C21-C22. Because it affirmed the determination that there was no statute permitting the district court to adjudicate petitioners' claims, the court of appeals did not need to reach the question whether Section 1252(a)(2)(B)(ii) would preclude judicial review if jurisdiction otherwise existed. Thus, although the court suggested that Section 1252(a)(2)(B)(ii) would bar review of petitioners' claims, that statement was dictum. That conclusion is reinforced by the language used by the court of appeals—"[t]he court *could have* also bottomed this conclusion," *ibid.* (emphasis added)—which makes clear that Section 1252(a)(2)(B)(ii) was not the basis for the court's holding. This case therefore does not squarely present a question about the reach of Section 1252(a)(2)(B)(ii).

2. Even if the court of appeals squarely had held that Section 1252(a)(2)(B)(ii) precluded review of petitioners' claims, this Court's review would not be warranted.

Petitioners contend (Pet. 2-5) that Section 1252(a)(2)(B)(ii) does not apply to their claims because they have pleaded a class action, and Section 1252(a)(2)(B)(ii) refers only to a single "decision or action" of the Attorney General or Secretary of Homeland Security. That argument is meritless. By its express terms, Section 1252(a)(2)(B)(ii) applies broadly to preclude review of "*any* * * * decision or action of the Attorney General or the Secretary of Homeland Security" specified to be within the Attorney General's

or the Secretary's discretion under the relevant subchapter of the INA. 8 U.S.C. 1252(a)(2)(B)(ii) (emphasis added). "Any" is a term of breadth, see, *e.g.*, *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835-836 (2008), and Congress has provided that, as a general matter, "words importing the singular include and apply to several persons, parties, or things," 1 U.S.C. 1. There is therefore no textual basis for assuming that Section 1252(a)(2)(B)(ii) applies only to challenges to individual decisions, as opposed to consolidated petitions for review of multiple decisions affecting one alien or cases in which several aliens raise the same claim. And there is no reason to believe that Congress would have intended such a counterintuitive rule. In any event, petitioners do not allege any disagreement in the courts of appeals on the question whether Section 1252(a)(2)(B)(ii) applies to class action lawsuits, and there is therefore no need for this Court to review that question.

Second, petitioners contend (Pet. 2-4) that Section 1252(a)(2)(B)(ii) does not apply to them under this Court's reasoning in *McNary*. They are mistaken. *McNary* addressed whether 8 U.S.C. 1160(e), the provision of the INA addressing administrative and judicial review under the special agricultural workers program put in place in the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, precluded the exercise of federal jurisdiction over an action alleging a pattern or practice of procedural due process violations by the Immigration and Naturalization Service (INS). 498 U.S. at 483. This Court held that Section 1160(e) did not preclude jurisdiction, because otherwise the aliens would be deprived of "meaningful judicial review of their statutory and constitutional claims." *Id.* at 484.

McNary is inapposite here for a number of reasons. First, it addressed Section 1160(e), which employs markedly different language than Section 1252(a)(2)(B)(ii), the provision petitioners address here. See 498 U.S. at 485-486 & n.6. Second, petitioners do not raise a challenge to INS procedures and practices of the type at issue in *McNary*. Instead, they are seeking adjudication of particular visa petitions. Cf. *id.* at 494 ("respondents' action does not seek review on the merits of a denial of a particular application"). In any event, even if the reasoning of *McNary* could be applied to this case, this Court's review is not warranted. Petitioners have not identified any court that has held that *McNary* informs the meaning of Section 1252(a)(2)(B)(ii), let alone identified a circuit conflict on the issue.

Finally, petitioners contend (Pet. i, 5) that the decision below conflicts with a decision of the Ninth Circuit on the question whether Section 1252(a)(2)(B)(ii) precludes judicial review of a visa petition revocation under 8 U.S.C. 1155. As an initial matter, aside from the fact that the court's statement about Section 1252(a)(2)(B)(ii) was dictum (see pp. 7-8, *supra*), the decision below is unpublished and does not create circuit precedent, and therefore does not give rise to the type of conflict in published opinions that may warrant this Court's review. In any event, there is no disagreement in the circuits about the type of claim petitioners raised in the district court. Petitioners' complaint did not seek judicial review of visa petition revocations; rather, the complaint sought to compel the government to adjudicate their visa petitions. Pet. App. A1. Somewhat confusingly, petitioners' complaint also recited that the government had threatened to revoke visa petitions for two of them—action that would presuppose that the peti-

tions had been approved—although even then the complaint did not allege that the visa petitions actually had been revoked. *Ibid.*[4] Petitioners have not identified any court of appeals decision that addressed whether Section 1252(a)(2)(B)(ii) precludes consideration of a claim like the one the complaint presented, which sought to compel CIS to act on a visa petition.

The decision below does not conflict with *ANA Int'l, Inc.* v. *Way*, 393 F.3d 886 (9th Cir. 2004). In that case, the court of appeals considered whether it had jurisdiction to consider an action "challenging the [AAO's] final revocation decision as unsupportable by substantial evidence." *Id.* at 890. Unlike in *ANA*, petitioners' complaint in district court did not challenge final revocations. Instead, the complaint purported to force the government's hand even before the administrative process is complete. There is therefore no disagreement in the circuits warranting this Court's review.[5]

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[4] Petitioners assert (Pet. 2) that this case is a class action with over 50 members, including "fourteen extraordinary amateur athletes" who "had their I-140 approvals revoked." That assertion is not consistent with their complaint, which defines the class as "amateur athletes that have had their I-140 applications denied" or "have been threatened with revocation." Pet. App. A2.

[5] Some courts of appeals have held, in disagreement with the Ninth Circuit, that Section 1252(a)(2)(B)(ii) precludes judicial review of a visa petition revocation under 8 U.S.C. 1155. See, *e.g.*, *Ghanem* v. *Upchurch*, 481 F.3d 222, 223-225 (5th Cir. 2007); *Jilin Pharm. USA, Inc.* v. *Chertoff*, 447 F.3d 196, 199-205 (3d Cir. 2006); *El-Khader* v. *Monica*, 366 F.3d 562, 567-568 (7th Cir. 2004). That disagreement is not implicated here. The court of appeals did not consider whether Section 1252(a)(2)(B)(ii) precludes judicial review of the denial of a visa petition under 8 U.S.C. 1153(b)(1)(A) or the revocation of a visa petition under 8 U.S.C. 1155, because petitioners sought to compel adjudication of their petitions, rather than seeking judicial review of final agency determinations. Pet. App. A1.

3. This case would be a poor vehicle to consider the reach of Section 1252(a)(2)(B)(ii), for two reasons. First, petitioners' claims are muddled and self-contradictory. Petitioners stated in their complaint that they sought to "compel the Defendants to adjudicate" (Pet. App. A1) their visa petitions. At the same time, the complaint also stated that petitioners' visa petitions already had been adjudicated, with the government denying some petitioners' visa petitions and threatening to revoke other petitioners' previously granted visa petitions. *Ibid.* Faced with these internally inconsistent allegations, the district court took petitioners' claims that they sought to compel the government to act on their visa petitions at face value and concluded that it lacked jurisdiction to compel such action. App., *infra*, 1a-2a. The court of appeals, while recognizing that petitioners' complaint sought to "compel the Defendants to adjudicate" their visa petitions, also observed that petitioners appeared to be seeking not simply adjudication, but "*favorable* adjudication." Pet. App. C20. There is, therefore, some ambiguity about the relief that petitioners actually sought, ambiguity that could not be further resolved on the record upon which this case now comes to this Court. Further, to the extent that what petitioners sought was adjudication of the visa petitions, the government already had adjudicated them, and petitioners' claims therefore fail because they received the relief they requested. And to the extent petitioners challenged a threatened revocation of a petition that was previously granted—but not *actual* revocation—there was no final agency action that could be the subject of judicial review.

Second, petitioners failed to respond meaningfully to the government's jurisdictional arguments below. As

the district court explained, when the government filed a motion to dismiss the complaint for lack of jurisdiction, petitioners filed a response that "utterly fail[ed] to address the government's jurisdictional arguments," instead "ma[king] a frivolous argument, unsupported by any authority, that the U.S. Attorney's Office must be disqualified from representation of the defendants." App., *infra*, 3a. The court of appeals likewise noted that petitioners "did not address the Defendants' jurisdictional arguments." Pet. App. C21. In light of petitioners' decision not to make arguments in support of jurisdiction below, this case would not be a good vehicle for considering whether Section 1252(a)(2)(B)(ii) precludes judicial review of denials of visa petitions and visa petition revocations.

4. Finally, the petition need not be held for this Court's decision in *Kucana* v. *Holder*, cert. granted, No. 08-911 (Apr. 27, 2009). The question presented in *Kucana* is whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the Board of Immigration Appeals' denial of an alien's motion to reopen his immigration proceedings. Pet. at i, *Kucana* v. *Holder*, *supra* (No. 08-911). Petitioners in this case have not filed motions to reopen their removal proceedings; indeed, they are not even in removal proceedings. To the extent that *Kucana* raises a broader question about whether decisions committed to the Attorney General's discretion by regulation, rather than by statute, are made unreviewable by Section 1252(a)(2)(B)(ii), see, *e.g.*, Gov't Br. at 18-20, *Kucana* v. *Holder*, *supra* (No. 08-911), that question also is not implicated here, because there was no suggestion in the decisions below that whether Section 1252(a)(2)(B)(ii) would preclude judicial review turned on a regulation. See App., *infra*, 4a-5a; Pet. App. C21.

It is therefore very unlikely that *Kucana* would have any bearing on the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2009

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

Case No. 08-21371-CIV-JORDAN

LEEVAN SANDS, GABOR MATE, CLAUDIA DEL POZO, KARL THANING, NICHOLAS FOLKER, HEATHER BRAND, MIHALY FLASKAY, EVETIANA KARPEEVA, AND ANNA NYIRY, PLAINTIFFS/PETITIONERS

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, CITIZENSHIP AND IMMIGRATION SERVICES, BY AND THROUGH DHS SECRETARY AND USCIS DIRECTOR, OFFICER 1014, AND DAVID L. ROARK, DIRECTOR, TEXAS SERVICE CENTER, DEFENDANTS/RESPONDENTS

ORDER GRANTING MOTION TO DISMISS AND CLOSING CASE

The plaintiffs filed this action to compel the defendants to adjudicate the Immigration Petitions for Aliens of Extraordinary Ability (Form I-140), filed under 8 U.S.C. § 1103, (§ 203(b)(1)(A) of the Immigration and Nationality Act (INA)). The plaintiffs filed their complaint on May 12, 2008, and thereafter filed an amended complaint on May 13, 2008. The plaintiffs subsequently filed a second amended complaint on May 20, 2008. The

government argues that the second amended complaint should be stricken because the plaintiffs did not seek or obtain their written consent or the court's leave in violation of Rule 15(a)(2). The second amended complaint, however, is substantively similar to the amended complaint, except that it adds another plaintiff, Anna Nyiry. The legal analysis is the same regardless of which complaint I consider, and so, I elect to consider and address the second amended complaint.[1]

For the reasons which follow, the defendants' motion to dismiss [D.E. 13] is GRANTED. The second amended complaint is dismissed for lack of jurisdiction.

I. FACTS

The plaintiffs are amateur athletes who fall in two groups. Plaintiffs Del Pozo, Thaning, Folker, Brand, Flaskay, and Karpeeva have had their I-140 applications denied, and plaintiffs Sands and Mate have been threatened with revocation of their approved I-140 petitions. The plaintiffs assert that Defendant Officer 1014 failed to follow the plain language of the applicable statute, and failed to apply the facts to the law, in denying the I-140 petitions, thereby engaging in unlawful acts. The plaintiffs seek a preliminary injunction and a temporary restraining order against the alleged acts of Defendant Officer 1014.

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[1] I therefore do not consider the initial complaint or the first amended complaint. *See Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241, 1243 (11th Cir. 2007) ("As a general matter, an amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against his adversary.") (internal citations omitted).

The plaintiffs assert jurisdiction under 8 U.S.C. § 1329 (the INA), 28 U.S.C. § 1361 (the mandamus statute), 28 U.S.C. § 1331 (federal question jurisdiction), 5 U.S.C. § 555(b) (the Administrative Procedure Act), and 28 U.S.C. § 1367(a) (supplemental jurisdiction). The government has moved to dismiss, arguing that there is no subject matter jurisdiction. The plaintiffs' response utterly fails to address the government's jurisdictional arguments. The plaintiffs instead have made a frivolous argument, unsupported by any authority, that the U.S. Attorney's Office must be disqualified from representation of the defendants. That request for disqualification is denied.

II. SUBJECT MATTER JURISDICTION

A federal court is under an independent obligation to determine whether subject-matter jurisdiction exists. *See, e.g., Cadet v. Bulger*, 377 F.3d 1173, 1179 (11th Cir. 2004). If there is no subject-matter jurisdiction, the case must be dismissed. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). In making this determination, I may look beyond the allegations in the complaint and view any evidence submitted by the parties to determine whether jurisdiction exists. *See Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). The plaintiffs' proposed jurisdictional bases are discussed below.

A. THE IMMIGRATION AND NATIONALITY ACT (8 U.S.C. § 1329)

The plaintiffs assert jurisdiction under to the INA, 8 U.S.C. § 1329. Historically, a court's jurisdiction to review the grant or denial of visa petitions to aliens was

found within the INA. In 1996, Congress enacted the Intelligence Reform and Responsibility Act (IIRIRA), which amended 8 U.S.C. § 1329 to repeal judicial review of such suits. In relevant part, § 1329 now states that "[t]he district courts of the United States shall have jurisdiction of all causes, civil and criminal, *brought by the United States* that arise under the provisions of this subchapter. . . . Nothing in this section shall be construed as providing jurisdiction for suits against the United States or its agencies or officers." *See* 8 U.S.C. § 1329 (emphasis added). Therefore, the plaintiffs reliance on the INA for purposes of subject-matter jurisdiction in this case is misplaced because § 1329 only confers jurisdiction if the action is brought by the United States. Moreover, there is clear language expressing that it does not provide jurisdiction for suits against the United States, its agencies, or officers. *See Jayme v. United States Dept. of Homeland Sec.*, 2008 WL 1885797, at *1 (S.D. Fla. Apr. 28, 2008) (citing *Ghergel v. United States Dept. of Homeland Sec.*, Case No. 06-20002-Highsmith, March 12, 2008 [D.E. 20]). *Jayme* and *Ghergel* each involved similar I-140 disputes and both courts held that the plain language of § 1329 precluded reliance on the INA for subject matter jurisdiction.

In addition, Congress recently amended the INA by adding § 1252(a)(2)(B)(ii), which provides as follows:

> Notwithstanding any other provision of law . . . no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary

> of Homeland Security, other than the granting of [asylum] relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B)(ii). The § 1252(a)(2)(B)(ii) jurisdictional bar precludes judicial review of discretionary decisions made under §§ 1151-1378 of the INA. *See Yerkovich v. Ashcroft*, 381 F.3d 990, 992 (10th Cir. 2004) ("the phrase 'this subchapter' refers to 8 U.S.C. §§ 1151-1378"). The Attorney General's authority to grant or deny visas to aliens of extraordinary ability in the field of athletics arises from 8 U.S.C. § 1153(b)(1)(A), and the authority to revoke such visas arises under § 1155. Such authority is discretionary, as explained later. As a result, § 1252(a)(2)(B)(ii) therefore precludes judicial review of this case. Judges in this district have consistently declined review of discretionary USCIS action, especially in cases involving I-140 petitions. *See Gringberg v. Swacina*, 478 F. Supp. 2d 1350, 1352 (S.D. Fla. 2007) (following majority rule in dismissing request for judicial review of USCIS action in light of § 1252(a)(2)(B)(ii) jurisdictional bar); *Jayme*, 2008 WL 1885797, at *2 (court lacked jurisdiction to review I-140 visa determination); *Gherghel*, No. 06-20002-Highsmith, March 12, 2008 [DE-20] (same).[2]

B. MANDAMUS JURISDICTION (28 U.S.C. § 1361)

Under § 1361, district courts have original jurisdiction over a mandamus action "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." *See* 28 U.S.C. § 1361. "Mandamus jurisdiction is an extraordinary

[2] I am aware of *Tjin-A-Tam v. United States Dep't of Homeland Sec.*, 2007 WL 2377047 (S.D. Fla. 2007), but that decision merely issued a stay and did not hold that there was jurisdiction.

remedy which should only be utilized in the clearest and most compelling of cases." *See Cash v. Barnhart*, 327 F.3d 1252, 1257 (11th Cir. 2003). Mandamus jurisdiction arises only in cases where "(1) the defendant owes a clear nondiscretionary duty to the plaintiff and (2) the plaintiff has exhausted all other avenues of relief." *See Life Star Ambulance Serv., Inc., v. United States*, 365 F.3d 1293, 1295 (11th Cir. 2004). The plaintiffs fail to meet the first prong because revocation of I-140 petitions is a discretionary act. *See Jayme*, 2008 WL 1885797, at *2 (citing *Ghanem v. Upchurch*, 481 F.3d 222, 224 (5th Cir. 2007)). I therefore need not address the second prong.[3]

C. FEDERAL QUESTION JURISDICTION (28 U.S.C. 1331)

Contrary to the plaintiffs' assertion, 28 U.S.C. § 1331 provides no independent basis for subject matter jurisdiction. *See St. Andrews Park, Inc. v. Dep't of Army Corps of Eng'rs*, 314 F. Supp. 2d 1238, 1242 (S.D. Fla. 2004) (citing *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173 (5th Cir. 1984)). Instead, an independent federal statutory or constitutional basis must exist to satisfy federal question jurisdiction. *See id.* As no viable statu-

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[3] Even if the plaintiffs satisfied both prongs of the mandamus requirements, "only the courts of appeal retain jurisdiction to consider constitutional and legal challenges to decisions pertaining to the denial of discretionary relief, such as the one presented in the instant mandamus petition." *See Sillah v. Lara*, 275 Fed. Appx. 822, 824 (11th Cir. 2008). The mandamus statute therefore apparently does not provide an independent ground for jurisdiction. *See United Petro/Energy Corp. v. United States*, 846 F. Supp. 993, 996 (S.D. Fla. 1994) (citing *Starbuck v. City and County of San Francisco*, 556 F.2d 450, 459 (9th Cir. 1977)).

tory or constitutional basis exists in the instant matter, federal question jurisdiction does not exist.

D. THE ADMINISTRATIVE PROCEDURE ACT (5 U.S.C § 555(b))

The Administrative Procedure Act (APA) does not provide a court with an independent basis for subject-matter jurisdiction. *See Califano v. Sanders*, 430 U.S. 99, 107 (1977) ("We thus conclude that the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action."). *See also Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 457-58 (1999). If at all, subject-matter jurisdiction is proper under the APA only in combination with a court's federal question jurisdiction under § 1331. *See Grinberg*, 478 F. Supp. 2d. at 1355. Although there is a presumption in favor of judicial review of agency action, that presumption may be overcome if the statutory scheme indicates that Congress intended to preclude such review. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984). Here, § 1252(a)(2)(B)(ii) plainly expresses that no judicial review of the Secretary's discretionary revocation decision is intended, thus precluding jurisdiction under the APA. *See Grinberg*, 478 at F. Supp. 2d at 1355. Because there is no other basis for jurisdiction here, the APA is inapplicable and does not afford an independent basis for jurisdiction.

E. SUPPLEMENTAL JURISDICTION (28 U.S.C. § 1367)

As the government correctly argues, § 1367 grants a court supplemental jurisdiction only where the court has original subject matter jurisdiction. *See Jayme*, 2008

WL 1885797, at *3. Because there is no original jurisdiction over any aspect of the case, supplemental jurisdiction does not arise. *See Scarfo v. Ginsberg*, 175 F.3d 957, 962 (11th Cir. 1999).

III. CONCLUSION

Accordingly, the defendants' motion to dismiss for lack of jurisdiction is GRANTED, and this case is DISMISSED. Any and all pending motions, including the motions for injunctive and emergency relief [D.E. 8, 29], are DENIED AS MOOT. This case is CLOSED.

DONE and ORDERED in chambers in Miami, Florida, this 10 day of September, 2008.

/s/ ADALBERTO JORDAN
ADALBERTO JORDAN
United States District Judge

Copies to: All counsel of record